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No.

In the

Supreme Court of the United States

October Term, 1997

EDWIN DEWS

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

with Appendix

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56 pp

QUESTIONS PRESENTED

Whether the construction of MCL 333.7453(2) given by the United States Court of Appeals is violative of the Due Process protection afforded by the Constitution?

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997
No._____

EDWIN DEWS,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ of Certiorari From The United States Court of Appeals For The Sixth Circuit

Petitioner, Edwin Dews, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit affirming his convictions pursuant to Title 21 USC Sec. 863(a)(1) and 846; Title 21 USC Sec. 331(a) and 331(a)(1) as being contrary to the Fifth and Fourteenth Amendments to the United States Constitution which guarantees Due Process of law and this Court's decision in *Fuentes v Shevin,* 407 US 76, 92 SCt 1983, 1994, 32 LEd 2d 556 (1972).

OPINIONS BELOW

The opinions from below include the unpublished opinion of the United States Court of Appeals for the Sixth Circuit decided May 15, 1997, which appears in Appendix A. The unpublished Order of the United States Court of Appeals denying Petitioner's Request for Rehearing dated July 15, 1997, appears in Appendix B.

JURISDICTION OF THE COURT

The Court of Appeals opinion was filed on May 15, 1997. A timely Petition for Rehearing was filed and thereafter denied by Order on July 15, 1997. This Court's jurisdiction is invoked pursuant to Title 28 USC Sec. 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTORY PROVISIONS INVOLVED

AMENDMENT 5:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service and time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty

or property, without Due Process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT 14:

Sec. 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

MCL 333.7453 provides:

> (1) Subject to subsection (2), a person shall not sell or offer for sale drug paraphernalia, knowing that the drug paraphernalia will be used to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance.
>
> (2) Before a person is arrested for a violation of subsection (1), the attorney general or a prosecuting attorney shall notify the person in writing, not less than 2 business days before the person is to be arrested, that the person is in possession of specific, defined material that has

been determined by the attorney general or prosecuting attorney to be drug paraphernalia. The notice also shall request that the person refrain from selling or offering for sale the material and shall state that if the person complies with the notice, nor arrest will be made for a violation of subsection (1).

(3) If a person complies with a notice sent under subsection (2), the compliance is a complete defense for the person against a prosecution under [333.7453], as long as the compliance continues.

MCL 333.7459 provides:

(1) A person who has received a notice under section [333.]7453(2) may commence an action for a declaratory judgment to obtain an adjudication of the legality of the intended sale or offer to sell.

(2) The attorney general or the prosecuting attorney who sent the notice under section [333.]7453(2) shall be made the defendant to an action commenced under subsection (1).

STATEMENT OF THE CASE

This Petition for a Writ of Certiorari concerns a Michigan statute which affirmatively requires a prosecutor to give written

notice to merchants of alleged drug paraphernalia that they possess specific, defined material the prosecuting attorney has determined to be illegal prior to any arrest being made. If the person complies with the notice, the statute provides that no arrest will be made for its substantive violation. MCL 333.7453(2) provides as follows:

> (2) Before a person is arrested for a violation of subsection (1), the attorney general or a prosecuting attorney shall notify the person in writing, not less than 2 business days before the person is to be arrested, that the person is in possession of specific, defined material that has been determined by the attorney general or prosecuting attorney to be drug paraphernalia. The notice also shall request that the person refrain from selling or offering for sale the material and shall state that if the person complies with the notice, nor arrest will be made for a violation of subsection (1).

Petitioner has asserted from the inception of these proceedings that compliance with the notice provision is a prerequisite to the issuance of a State search warrant. The relevant facts and circumstances are as follows:

On September 25, 1992, officers of the Saginaw Police Department, acting upon authority of a search warrant signed by a state 70th District Court judge, raided the Rock-a-Rolla outlet at 3125 E. Holland, Saginaw, Michigan and seized the entire merchandise inventory of the outlet. On September 29, 1992, the Saginaw County Prosecutors Office filed a petition for forfeiture and/or abatement of nuisance against the Holland Avenue store and all of the seized assets in the Saginaw County Circuit Court. Case No. 92-900227-CP. On September 30, 1992, the Saginaw County Prosecutor wrote a letter to petitioner entitled "Notice of Violation of Drug Paraphernalia Statutes" which was addressed to three Rock-a-Rolla record outlets located in Saginaw County and to petitioner and his son at their Genesee County resident addresses. The letter was to function as the notice required by the Michigan statute and specifically identified twenty-two items in the stores' inventory and three types of publications to be unlawful "drug paraphernalia" as defined by state law. (R 20, Exhibit C) No criminal charges were lodged as a result of the September 25,

1992 search warrant. The civil forfeiture action was litigated primarily by Saginaw Assistant Prosecutor, George Best, a forfeiture specialist with the Wayne County Prosecutors Office and the United States Attorneys Office in Detroit, Michigan. On September 8, 1993, the day of the trial before state court judge Crane was scheduled to commence, the parties placed a settlement upon the circuit court record which Mr. Best stated was "a resolution of this matter in its entirety". (R 20, Ex D) The record of proceedings conducted September 8, 1993, reflect that although many items deemed to be "paraphernalia" were being surrendered to the seizing agency in order to assure the return of all of the clearly non-contraband inventory and most of the cash that had been seized and held for nearly a year, that petitioner and Rock-a-Rolla expressly did not admit that the forfeited items were unlawful under the state statute.

On the same day that the settlement agreement resolving the paraphernalia forfeiture controversy "in its entirety" was being placed upon the Saginaw Circuit Court record, police officers and

confidential informants were going to other Rock-a-Rolla store outlets, in order to observe the stores' current inventory. Based upon various state law enforcement officers actions during the ten day period attending the September 8, 1993 settlement agreement, Assistant Prosecutor, George Best, authorized another, far more sweeping search warrant application to be submitted to a state court district judge on September 17, 1993. (R 44 Ex N)

The search warrant signed by the state district judge on the morning of September 17, 1993, authorized the state law enforcement officials to search and seize evidence not only from the Rock-a-Rolla stores, but also from the residence and van of petitioner in Durand, Michigan. The property description of the search warrant detailed what was to be seized. Despite the stated limitations police confiscated what was essentially petitioners life savings, along with the entire inventory contents of all six Rock-a-Rolla store outlets. (R 44, Ex M)

Although no "notice of violation of drug paraphernalia statute" letter preceded the September, 1993 raids upon the Rock-

a-Rolla stores and petitioners residence, the Saginaw County Prosecutors Office charged petitioner criminally with a ninety day misdemeanor under the state paraphernalia statute. *People v Edwin Dews*, Saginaw District Court No. 93-4936-SM. Assistant Prosecutor Best also filed another circuit court forfeiture proceeding, seeking to forfeit the entirety of Rock-a-Rollas' real property, personal property inventory, and petitioner's life savings under the Michigan drug paraphernalia statute. Saginaw Circuit Court No. 93-900-203-CF.

On March 10, 1994, petitioner's trial counsel was handed copies of a motion and order of nolle prosequi dated March 10, 1994, prepared by Assistant Prosecutor George Best which Judge Titus had signed dismissing the State misdemeanor charges. Prosecutor Best's motion cited as it's sole reason "the best interest of justice-case transferred to Federal jurisdiction" (R20, Ex J)

On July 27, 1994, a Grand Jury sitting in the Eastern District of Michigan, Northern Division, Bay City, Michigan, returned a four count true bill of indictment against petitioner,

Edwin Dews, and his son, Thomas Dews. Count I alleged a conspiracy to sell and offer for sale drug paraphernalia pursuant to Title 21, USC, Sec. 863(a)(1) and 846. Count II alleged a substantive violation of selling and offering for sale drug paraphernalia. Title 21 USC Sec. 863(a)(1). Count III alleged that a violation of Title 21 USC Sec. 353(b)(1) occurred by virtue of allegations that petitioner dispensed Lidocaine, other than upon written prescription. Count IV alleged that petitioner introduced Lidocaine into the stream of commerce, contrary to Title 21 USC Sec. 331(a). The case was assigned to the Honorable Robert Cleland, a district judge sitting in the Eastern District of Michigan, Northern Division. The petitioner entered pleas of not guilty and was placed on a personal bond.

On December 19, 1994, a Superseding Information was filed which amended Counts III and IV of the indictment and added two additional counts. The Information alleged four separate instances of Lidocaine being mis-labeled and introduced

into the stream of commerce contrary to Title 21 USC, Sec. 331(a) and 331(a)(1).

Petitioner, pursuant to Federal Rule Criminal Procedure Rule 12, concurred in and adopted Thomas Dews motion to suppress, which was premised on alleged violations of the Michigan Notice Provisions in addition to asserting other invalidities relating to the over-breadth of the warrant.

On April 25, 1995 an evidentiary hearing was conducted relative to the search. Various search and seizure issues were litigated in addition to the notice argument. At the conclusion of proofs, petitioner asserted the court should suppress the evidence for the state's failure to provide notice pursuant to statute. (Tran 4/25/95 p 26). Petitioner further asserted there was a lack of probable cause and that the warrant was over-broad (Tran 4/25/95 pp28-31).

The trial court indicated it was inclined to rule the warrant was supported by probable cause, that there was reasonably fresh information to prevent staleness and, that as a whole, the warrant

was sufficiently particular. The court indicated that even if probable cause was lacking, that *United States v Leon*, 468 US 897, 104 SCt 3405 (1984) would save it. (Tran 4/25/95 pp 43-44). Thereafter, the parties submitted supplemental briefs and the court issued a Memorandum Opinion and Order on May 24, 1995. (R 54)

Trial proceedings concluded on September 19, 1995 with the jury finding petitioner guilty as to all counts.

Sentencing proceedings were convened on January 22 and January 26, 1996. The trial court imposed a sentence of twenty four months on each of Counts I and II, to be run concurrently with one another and twelve months in regards to Counts III-IV, also to be run concurrent. In addition, the court imposed a period of one year supervised release. The judgment and commitment order was entered on February 6, 1996.

On appeal petitioner asserted that non-compliance with the provisions of MCL 333.7453(2) deprived the state court judge the jurisdiction to issue the search warrant.

The United States Court of Appeals for the Sixth Circuit affirmed petitioner's conviction in a per curium unpublished opinion on May 15, 1997. (See Appendix) In pertinent part the court ruled as follows:

> Dews's argument is unconvincing for several reasons. First, a federal court only must exclude evidence seized in violation of the federal constitution; although a state may impose a rule that is more restrictive than the Fourth Amendment to be applied in state courts, the state rule does not have to be applied by federal courts. *United States v Wright*, 16 F.3d 1429, 1434 (6th Cir. 1994). Thus, a federal court is under no obligation to consider state law when determining the constitutional validity of a search and seizure. Second, the *Conine* case [*United States v Conine*, 33 F3d 467 (5th Cir 1994)] relied upon by Dews is distinguishable from the present case. *Conine* involved the determination of whether the state court issuing the warrant had territorial jurisdiction to do so, considering state law rather than Fed. R. Crim. P. 41(a). Although Dews attempts to frame his argument as a jurisdictional issue ("the state court did not follow state law, therefore the state court did not have jurisdiction"), the issue involved is whether a federal court must apply state law in determining the validity of a search warrant. Under *Wright*, a federal court clearly is not required to do so. Finally, even if this court chose to consider the Michigan law, that law applies to **arrests**, not to the issuance of search warrants. Dews cites no authority that extends the

> statute to the issuance of warrants. Accordingly, Mich. Comp. Laws § 333.7453(2) has no effect on the validity of the search warrants.

Thereafter, petitioner sought rehearing in the Court of Appeals asserting they misunderstood his argument, and that a review of their decision would reveal that it deprived petitioner Due Processes as guaranteed by the United States Constitution. Petitioner further asserted their decision nullified the provisions of MCL 333.7453(2).

On July 15, 1997 the United States Court of Appeals entered its order denying petitioner's petition for rehearing.

REASONS FOR GRANTING THE WRIT

The Court of Appeals' construction of the relevant portions of Michigan statutes pertaining to the offering for sale or sale of alleged drug paraphernalia violated the Due Process Clauses of the Fifth Amendment and Fourteenth Amendments to the United States Constitution.

The Due Process Clause of the Fourteenth Amendment prohibits a State from depriving a person of life, liberty or property without Due Process of law. *Goss v Lopez*, 419, US 565, 95 SCt 729, 42 LEd 2d 725 (1975). This Court stated in *Goss* that:

> Protected interests in property are normally not 'created by the Constitution. Rather, they are created and their dimensions are defined' by an independent source such as state statutes or rules entitling the citizen to certain benefits. *Goss* supra, at 573-574 quoting *Board of Regents v Roth*, 408 US 564, 577, 92 SCt 2701, LEd 2d 548 (1972).

The Due Process Clause also prohibits arbitrary deprivations of liberty. "Where a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, the minimal requirements of the Clause must be satisfied". *Goss*, supra at 575 quoting *Wisconsin v Constantineaw*, 400 US 433, 437; 91 SCt 507, 510; 27 LEd 2d 515 (1971). In determining whether the Due Process Clause applies in the first instance, this Court examines the nature of the interest at stake, not the weight of it. *Board of Regents*, (supra) 570-571.

Once it is determined the Due Process Clause applies it becomes necessary to answer the question of what process is due. *Morrissey v Brewer*, 408 US 471, 92 SCt 2593; 33 LEd 2d 484 (1972).

The Michigan legislature has determined that before one can be arrested and prosecuted for a substantive violation of selling or offering for sale drug paraphernalia that a prosecutor must first provide written notice to a merchant. The written notice must affirmatively identify what the merchant is selling or offering for sale that the prosecutor has determined to be illegal. MCL 333.7453(2). The notice must provide the merchant with at least two days notice prior to an arrest. The statutory scheme provides two distinct and complete escape valves to merchants. A merchant may avoid criminal liability by removing alleged paraphernalia from his shelves and further refrain from offering it for sale. MCL 333.7453(3). In the second instance, a merchant may avail himself of a judicial hearing by commencing an action for a declaratory judgment pursuant to MCL 333.7459, which authorizes a person

who has received a notice pursuant to MCL 333.7453(2) to obtain an adjudication of the legality of the intended sale or offer to sell. Here, Due Process protected petitioner's property interest in that the legislation allowed petitioner to sell or offer to sell the subject property until he was notified in writing that same was deemed to be illegal. He also has a property interest in goods that cannot be sold subsequent to receipt of a notice as he may have been entitled to substantial refunds for goods he could not sell. It is furthermore unquestionable that petitioner had a liberty interest at stake as the statute is penal.

The statutory scheme clearly entitled petitioner to the protection of Due Process by the state judge prior to the authorization given in the search warrant to search and seize. In *Fuentes v Shevin,* 407 US 76, 92 SCt 1983, 1994, 32 LEd 2d 556 (1972) this court indicated:

> For more than a century, the central meaning of procedural Due Process has been clear: 'parties whose rights are to be effected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' *Baldwin v Hale*, 1 Wall

> 223, 233, 17 LEd 531. See *Windsor v McVeigh*, 93 US 274, 23 LEd 914; *Hovey v Elliott*, 167 US 409, 17 SCt 841, 42 LEd 215; *Grannis v Ordean*, 234 US 385, 34 SCt 779, 58 LEd 1363. It is equally fundamental that the right to notice and an opportunity to be heard 'must be granted at a meaningful time and in a meaningful manner. *Armstrong v Manzo*, 380 US 545, 552, 85 SCt 1187, 1191, 14 LED 2d 62.

Petitioner was entitled to written notice of what property he was selling or offering for sale that was deemed to be illegal, and thereafter he was entitled to the benefit of two days to remove the items and further refrain from their being offered for sale or the opportunity to be heard in a court on the issue of their legality. The failure to afford petitioner written notice, the opportunity to refrain from selling or offering for sale alleged paraphernalia or to seek a judicial hearing constituted a direct deprivation of Due Process.

Under the analysis made by the United State Court of Appeals, the Michigan statutory scheme only applied to arrests and did not require notice prior to a seizure made pursuant to the

Fourth Amendment. This analysis renders the statute a nullity and avoids the constitutional protection petitioner should have been afforded by Due Process. In *United States v James Daniel Good Real Property*, 114 SCt 492, 498 (1993), the government seized real property pursuant to a warrant without giving the defendant the benefit of prior notice. The government argued that because civil forfeiture served a law enforcement purpose that it only need comply with the dictates of the Fourth Amendment. This court explicitly disagreed and stated:

> The Fourth Amendment does place restrictions on seizures conducted for purposes of civil forfeiture. *One 1958 Plymouth Sedan v Pennslyvania*, 380 US 693, 696, 85 SCt 1246, 1248, 14 LEd 2d 170 (1965). (Holding that the exclusionary rule applies to civil forfeiture), but it does not follow that the Fourth Amendment is the sole constitutional provision in question when the Government seizes property subject to forfeiture.
>
> We have rejected the view that the applicability of one constitutional amendment preempts the guarantees of another. As explained in *Soldal v Cook County*, 506 US _____113 SCt 538, 548, 121 LEd 2d 450 (1992):

> Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the constitutions commands. Where such multiple violations are alleged we are not in the habit of identifying, as a preliminary matter, the claim's 'dominant' character. Rather, we examine each constitutional provision in turn.
>
> Here, as in *Sodal*, the seizure of property implicates 'explicit, textual, source[s] of constitutional protections,' the Fourth Amendment and the Fifth. *Ibid.* The proper question is not which amendment controls, but whether either amendment is violated. *United States v James Daniel Good Real Property, supra,* at 499.

In this matter the State sought to forfeit the property as well as to subject Petitioner to criminal penalties. The Court of Appeals decision allows Fourth Amendment concerns to fully swallow and subsume Due Process protections. This is not a case where Due Process concerns can be overlooked. The Court of Appeals erred in failing to afford Petitioner the protection of Due Process.

From the perspective of the state court judge who issued the search warrant, he should have had probable cause to believe

that criminal activity existed and that a fair probability existed that the contraband or evidence of criminal activity was at the particular place described. *Illinois v Gates*, 462 US 213, 103 SCt 2317, 2332, 76 LEd 2d 527 (1983). For criminal activity to have existed in this case, the magistrate must have been armed with some information which would indicate that the two day statutory time period had lapsed. It is not until this point in time that criminal activity could have existed under the statute. The state magistrate did not have this when he authorized the search warrant. Furthermore, if the Court of Appeals analysis is given any effect, under the terms of the statute, an arrest would never be possible and the net result would be a seizure of property for a purpose inconsistent with the Fourth Amendments primary goal of allowing preservation of evidence of criminal wrong doing. As a matter of Due Process, the state magistrate could not issue the search warrant without first affording petitioner the benefit of the hearing the statute entitled him to, or the refraining from the sale or offering for sale the merchandise. The state magistrate here lacked the

constitutional authority as well as the statutory authority to issue the search warrant.

Further analysis of the Court of Appeals opinion regarding the provisions of MCL 333.7453(2) being applicable only to arrests result in the statute being unconstitutionally vague. The void-for-vagueness doctrine requires that a penal statute define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. *511 Detroit Street, Inc. v Frank J. Kelley*, 807 F2d 1293, 1295 (6th Cir, 1986) citing *Kolendar v Lawson*, 461 US 352, 357; 103 S Ct 1855, 1858, 75 L Ed 2d 903 (1983).

Ordinary people would understand the provisions of the statutory scheme to mean that they would not have committed a crime while in possession of said materials prior to receiving a notice, and as long as they did not sell or offer to sell the materials after receiving a notice. Ordinary people would understand the provisions of MCL 333.7459 to mean they could possess the

materials, although refraining from their sale or offering to sell, and seek declaratory relief. By allowing the seizure pursuant to search warrant to stand, the Court of Appeals has rendered the statutory scheme meaningless and it is axiomatic that statutes should not be interpreted in a manner that leaves its provisions meaningless. This Court's construction of the statute allows for the seizure of materials in a manner that is highly arbitrary and discriminatory as governmental authorities can avoid giving the notice and advising of what particular items are possessed which the government has deemed illegal in the first instance, i.e. nullifying the statute. In this case it can only be queried as to whether or not the Appellant would have ceased selling or offering for sale various materials, as he did not receive a notice provided for by statute. However, assuming that Appellant would have refrained from selling or offering for sale the material confiscated by the search warrant had he been given notice, he would neither have been arrested or prosecuted in accordance with the requirements of MCL 333.7453(2). Further, it would have been

impossible for the State authorities to represent in the Affidavit for the search warrant that criminal activities existed and that a fair probability existed that contraband or evidence of a criminal act was at the place described. Probable cause to search, as it has been defined and agreed to in this cause, would not have existed for the issuance of the warrant. *Illinois v Gates, supra.*

Clearly the interpretation given the statute by the Court of Appeals rendered it void as being unconstitutionally vague.

A final Due Process concern exists in regard to this matter. Petitioner suggests that an implicit authorization exists in MCL 333.7453(2) to sell and offer to sell the alleged material, until such time as the notice requirement is acted upon. Appellant had a right to rely upon this provision. The Due Process Clause of the Fifth Amendment is offended and a conviction cannot stand under it where a citizen engages in conduct after a State official tells the Defendant that the particular conduct is legal and the Defendant believes the official. *US v Hurst* 951 Fed2d 1490, 1499 (6th Cir 1991).

In this matter, the provisions of MCL 333.7453(2) amount to a direct pronouncement to Petitioner by the legislature that his conduct was legal until such time as he was advised otherwise by a prosecuting official by proper notice, and failed to comply with the notice provided him by the prosecuting authority. To rule otherwise would be to negate the Michigan legislative pronouncement.

CONCLUSION

The Court of Appeals decision that only Fourth Amendment concerns were to be used to determine the validity of the state search warrant circumvented protections guaranteed by the Due Process Clause in the context of this case. The Due Process Clause and the decisions of this Court construing it are of equal concern to Fourth Amendment Concerns.

For the foregoing reasons Petitioner requests the Court to grant his petition or in the alternative Petitioner requests this Court to exercise its supervisory power and correct the deprivation of

Due Process which has occurred here by declaring the search warrant invalid by virtue of the deprivation of Due Process.

Respectfully Submitted,

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October 9th, 1997

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

OPINION

Sixth Circuit Case Nº. 96-1268
Filed May 15, 1997

Pages A-1 thru A-21

NOT RECOMMENDED FOR PUBLICATION

NO. 96-1268

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

EDWIN A. DEWS,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

FILED MAY 15, 1997 LEONARD GREEN, CLERK

BEFORE: **GUY, MOORE** AND **COLE,** Circuit Judges.

R. GUY COLE, JR., Circuit Judge. Defendant appeals his jury conviction and the sentence imposed for conspiracy to distribute drug paraphernalia, distribution of drug paraphernalia, and distribution of misbranded drugs. Specifically, defendant contests the following: (1) the district court's denial of his motion to suppress; (2) his conviction for criminal contempt; (3) the district court's sentencing guideline calculations with respect to criminal history category and enhancement for role in the offense; and (4) the district court's denial of his claim of prosecutorial vindictiveness. For the reasons that follow, we affirm defendant's conviction and sentence.

I.

For the past twenty-one years, defendant Edwin Dews (Dews), his son Thomas Dews, and his ex-wife Barbara Dews were involved in the ownership and operation of Six Rock-A-Rolla Record stores in the Flint and Saginaw areas of Michigan. The stores were actually owned by the Rock-A-Rolla Record Corporation, with the stock divided between Dews, Thomas Dews, Barbara Dews and Dew's daughter, Sharon. The stores sold compact discs, music-related items, and "tobacco-related" items. The tobacco-related items included pipes, scales, rolling papers, bongs, grinders, screens and substances generally used to "cut" narcotic drugs, such as Vitamin B, mannitol and lidocaine.

During the summer of 1992, Buena Vista, Michigan police officer Sean Waterman investigated one of the stores for the sale of drug paraphernalia, ultimately obtaining a search warrant on September 25, 1992. As a result, the contents of the store were seized, and on September 29, 1992, the Saginaw County prosecutor's office filed a petition for forfeiture and/or abatement of nuisance in the state court. On September 30, 1992, the Saginaw County prosecutor wrote a letter to Dews entitled "Notice of Violation of Drug Paraphernalia Statutes," in accordance with Mich. Comp. Laws § 333.7453(2). A year later, on September 8, 1993, a trial was scheduled to commence in state court on the violation; however, on that date the parties entered into a settlement agreement that was "a resolution of this matter in its entirety."

Also in September 1993, Officer Waterman visited two other Rock-A-Rolla stores and observed several of the same types of items for sale. Waterman once again requested search warrants, which a state judge authorized on September 17, 1993. Searches were thereafter executed at four Rock-A-Rolla Record stores, the residence and van of Dews, the residence of Thomas Dews, and the residence of Dew's accountant. The entire inventories of the stores were seized, along with personal items and business records from the residences.

The Saginaw County prosecutor's office charged Dews with a misdemeanor under Michigan's Drug Paraphernalia Statute and filed a civil forfeiture action. The state ultimately dismissed the charges, and on July 28, 1994, a federal grand jury charged Dews and Thomas Dews in a four-count indictment with: conspiracy to distribute drug paraphernalia in violation of 21 U.S.C. § 846; selling and aiding and abetting in the sale of drug paraphernalia in violation of 21 U.S.C. § 863(a)(1) and 18 U.S.C. § 2; and two counts relating to the sale of lidocaine. On December 19, 1994, the government filed a superseding information which substituted four counts of introducing misbranded lidocaine into interstate commerce in violation of 21 U.S.C. §§ 331(a) & 331(a)(1) and 18 U.S.C. § 2, for the lidocaine-related counts in the indictment. The charges in the indictment later were dismissed as to Thomas Dews, when he pleaded guilty to one count of distributing unbranded lidocaine.

Dews filed a motion to dismiss the indictment based on prosecutorial vindictiveness. After holding an evidentiary hearing, the court denied the motion. Dews also filed a motion to suppress all evidence seized as a result of the search warrants issued on September 17, 1993, alleging that probable cause for the search warrants was lacking, the search warrants were overbroad and lacking in particularity, and the search warrants authorized the seizure of a

tremendous amount of non-contraband. The court held an evidentiary hearing and, in a written order, denied Dew's motion to suppress. The court found that probable cause existed and the warrants were valid except for the portion of the warrants that allowed the officers to seize anything "subject to forfeiture." The court determined that this overbroad provision did not invalidate the warrants, however, because that portion was severable from the otherwise valid warrants.

Trial began on September 6, 1995. Several employees of the stores testified, admitting that the items sold at the "tobacco counter" were intended for use with illegal drugs; however, the employees stated that they were instructed to "play dumb" and not answer any inquiries as to whether the items were for use with illegal drugs. Thomas Dews testified that he made the ordering decisions for the music-related items that the stores carried, while his father made most of the decisions for the items sold at the tobacco counter. Expert testimony revealed that most of the items stocked at the tobacco counter commonly were used with illegal drugs.

At one pint during a recess in the trial, the judge was "served process" with a "Writ of Habeas Corpus" bearing the caption, "In the court of the Sovereign Edwin

Dews."[1] When the jury was reentering the courtroom after the recess, Dews began addressing the jury, informing them of the lawsuit he had filed against the judge. Dews continued to address the jury, despite the judge's instructions to be seated and stop speaking. Based on this incident, the court summarily found Dews in criminal contempt of court, revoked his bond and sentenced him to ninety days' incarceration.

The jury ultimately convicted Dews on all counts. Prior to sentencing, Dews filed a pro se notice of appeal of the "Federal Question(s)/Verdict entered in this action on 09/12/95-09/20/95."[2] On November 30, 1995, this court entered an order dismissing that appeal as premature for lack of a final judgment. On January 26, 1996, the district court sentenced Dews to concurrent terms of twenty-four months' imprisonment as to counts one and two, and

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[1] Dews apparently raised a continuing objection at trial that, because he was a "sovereign person," he was not subject to the court's jurisdiction.

[2] The dates noted were the dates of Dews's jury trial. In response to a show cause order issued by this court prior to dismissing that appeal, Dews asserted that the district court lacked jurisdiction, venue was improper, and that the double jeopardy clause was violated by his conviction and sentence because Michigan has never ceded its jurisdiction to the federal court.

concurrent terms of twelve months' imprisonment as to counts three through six.[3] In determining Dews's sentence, the court considered his conviction for criminal contempt in calculating his criminal history category, and enhanced his offense level for being a leader or organizer of five or more participants. Dews filed a timely notice of appeal of his conviction and sentence.

II.

This court reviews a district court's decision on a motion to suppress under two complementary standards: first, the district court's findings of fact are upheld unless clearly erroneous; and second, the district court's legal conclusions are reviewed de novo. *United States v. Leake*, 998 F.2d 1359, 1362 (6th Cir. 1993).

A. Noncompliance with Mich. Comp. Laws § 333.7453(2)

Dews argues that the warrants, obtained from a state court judge, did not comply with the Michigan statute that requires that an individual be given two days notice before

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[3] The judgment and commitment order was entered on February 6, 1996.

being arrested on paraphernalia charges.[4] *See* Mich. Comp. Laws § 333.7453(2).[5] In support of his argument that a federal court must consider state law in this circumstance, Dews relies on the Fifth Circuit case that held that state law applies when considering the jurisdiction of the state court that issued the search warrant. *United States v. Conine*, 33 F.3d 467, 469 (5th Cir. 1994).

Dew's argument is unconvincing for several reasons. First, a federal court only must exclude evidence seized in

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[4] Dews did not raise this issue in his written motion to suppress; however, Dews presented the issue orally at the suppression hearing. Thus, the issue appears to be properly before the court.

[5] Mich. Comp. Laws § 333.7453(2) provides:

> Before a person is arrested for a violation of subsection (1), the attorney general or a prosecuting attorney shall notify the person in writing, not less than 2 business days before the person is to be arrested, that the person is in possession of specific, defined material that has been determined by the attorney general or prosecuting attorney to be drug paraphernalia. The notice also shall request that the person refrain from selling or offering for sale the material and shall state that if the person complies with the notice, no arrest will be made for a violation of subsection (1).

violation of the federal constitution; although a state may impose a rule that is more restrictive than the Fourth Amendment to be applied in state courts, the state rule does not have to be applied by federal courts. *United States v. Wright*, 16 F.3d 1429, 1434 (6th Cir. 1994). Thus, a federal court is under no obligation to consider state law when determining the constitutional validity of a search and seizure. Second, the *Conine* case relied upon by Dews is distinguishable from the present case. *Conine* involved the determination of whether the state court issuing the warrant had territorial jurisdiction to do so, considering state law rather than Fed. R. Crim. P. 41(a). Although Dews attempts to frame his argument as a jurisdictional issue ("the state court did not follow state law, therefore the state court did not have jurisdiction"), the issue involved is whether a federal court must apply state law in determining the validity of a search warrant. Under *Wright*, a federal court clearly is not required to do so. Finally, even if this court chose to consider the Michigan law, that law applies to **arrests**, not to the issuance of search warrants. Dews cites no authority that extends the statute to the issuance of search warrants. Accordingly, Mich. Comp. Laws § 333.7453(2) has no effect on the validity of the search warrants.

B. Particularity

Dews argues that the warrants were defective because the items to be seized were not particularly described. The items to be seized were described in the warrants as follows: (A) Drug paraphernalia (this section gave a complete definition of the term, including thirteen detailed examples); (B) documentation of the sale of any of the items described in (A) (again, a complete definition was given); (C) business policy manuals or advertisements relating to the items described in (A); (D) documentation of ownership or control of the stores; (E) marijuana and/or cocaine; (F) firearms, ammunition, and firearms licenses or registrations; and (G) items subject to forfeiture pursuant to Michigan law. The district court determined that Paragraph G, which sought seizure of "any and all items subject to forfeiture pursuant to MCL 333.7521 and evidence supporting such forfeiture" was overly broad, and any evidence seized pursuant to that section was not admissible. The district court severed that portion of the warrants and found that the remaining items to be seized were particularly described, and thus, were not affected. Dews contends, however, that severance was inappropriate because there was no meaningful way to separate the items in Paragraph G from the other items listed in the warrant. We disagree.

The Fourth Amendment requires warrants to "particularly describ[e] the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. "The particularity requirement eliminates the 'danger of unlimited discretion in the executing officer's determination of what is subject to seizure'....The degree of specificity required 'depends on the crime involved and the types of items sought." *United States v. Blakeney*, 942 F.2d 1001, 1026-27 (6th Cir. 1991) (citations omitted). In *Blakeney*, this court held that its finding of overbreadth with respect to the generic term "jewelry" did not require suppression of all the items seized pursuant to the warrant. *Id.* at 1027. "[T]he proper approach to this dilemma is to sever the infirm portion of the search warrant from the remainder which passes constitutional muster." *Id.* (citations omitted).

In the present case, Dews's argument centers on Paragraph G of the warrant, as well as the "high profile excess of zeal by the executing team of officers when they interpreted the warrant's sweeping language to authorize seizure of Rock-A-Rolla's entire inventory and documentation." As the district court found, the sweeping language of Paragraph G was certainly lacking in particularity. However, contrary to Dews's contention, Paragraph G was easily severable from the warrants, and the remaining paragraphs of the warrants were specific enough to pass constitutional muster. Further, none of the

items seized pursuant to the overbroad provision was used as evidence against Dews. Thus, as in *Blakeney*, Dews cannot show any prejudice resulting from the defect in the warrant. *Id.* Accordingly, the district court properly rejected this argument in considering Dews's motion to suppress

C. Probable Cause

In this case, the district court determined that probable cause existed for the issuance of the September 17, 1993 search warrants. Dews contends, however, that the affidavits did not provide probable cause for the issuance of the search warrants. Specifically, Dews argues that because the affidavits rely on the 1992 raid of one Rock-A-Rolla store, the affidavits do not set forth any indication of criminal activity occurring at the time of the issuance of the search warrants.

Although a district court's legal conclusion as to the existence of probable cause is reviewed de novo, the review of a state judge's determination of probable cause is given "great deference" such that the judge's findings "should not be set aside unless arbitrarily exercised." *Leake*, 998 F.2d at 1363 (citations omitted). An affidavit need not establish beyond a reasonable doubt that incriminating evidence will be found. *Blakeney*, 942 F.2d at 1025. A warrant must be

upheld as long as the judge had a "substantial basis" to conclude that a search would uncover evidence of wrongdoing. *Illinois v. Gates*, 462 U.S. 213, 238 (1983). Thus, probable cause exists when the "totality of the circumstances" indicate that there is a "fair probability" that there is evidence or contraband at the place described. *Id.*

In the present case, the affidavits, which were executed by two law enforcement officers, set forth great detail regarding the 1992 search and seizure of one Rock-A-Rolla store.[6] The affidavits also set forth the affiants' statements that they had seen drug paraphernalia at three Rock-A-Rolla stores on September 7 and 8, 1993. In addition, the affidavits provided that another undercover officer made a controlled purchase of a drug pipe and mannitol at one of the stores on September 9, 1993. Finally, the affidavits provided that other officers went to yet another store that had a "drive-up" window through which they observed drug paraphernalia items.

Based on the totality of the circumstances, the state judge was correct in finding that the affidavits established

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[6] This portion of the affidavits had a typographical error in Paragraph H that referred to "1993" instead of "1992." As the district court found, there is no evidence that this was a deliberate falsehood or had any impact on the issuance of the search warrants.

probable cause for the issuance of the search warrants. The affidavits did not rely on the 1992 incident, but rather, provided statements of recent activities that indicated a "fair probability" that contraband or evidence would be found at the places described. Accordingly, Dews's argument in this regard was properly rejected by the district court.

D. *Leon* Good Faith

The district court found that even if probable cause did not exist, the warrants were saved by the good faith exception set forth in *United States v. Leon*, 468 U.S. 897 (1984). In *Leon*, the Supreme Court held that the Fourth Amendment exclusionary rule did not bar evidence seized in reasonable, good faith reliance on a search warrant that is subsequently held to be defective. *Id.* at 905. However, the *Leon* good faith exception does not apply in four situations: (1) when the supporting affidavit contained knowing or reckless falsity; (2) when the issuing magistrate failed to act in a neutral and detached fashion, and served merely as a "rubber stamp" for the police; (3) when the supporting affidavit did not provide the magistrate with a substantial basis for the determination of probable cause, in other words, only a "bare bones" affidavit was provided; and (4) when the officers' reliance on the warrant was neither in good faith nor objectively reasonable. *Id.* at 914-16, 922.

Dews argues that the issuing judge was not neutral and detached, and that the officers failed to act in good faith and were not objectively reasonable. The basis of Dews's argument is that the judge and the officers were aware of the "notice requirement" set forth in Mich. Comp. Laws § 333.7453(2) which was not provided to Dews; yet, despite this fact, the judge issued and the officers carried out the search warrants. As previously discussed, however, Dews's argument regarding the notice requirement lacks merit; thus, the judge and the officers had no reason to refuse to carry out the warrants on this basis. Further, there is no indication that any of the four bars to the application of the *Leon* good faith exception were present in this case. Accordingly, even if the search warrants had been defective, the warrants were carried out in reasonable, good faith reliance and thus were constitutionally valid. The district court did not err in denying Dews's motion to suppress.

III.

Dews argues that the district court's finding of criminal contempt pursuant to 18 U.S.C. § 401(1) and Fed. R. Crim. P. 42(a) requires reversal. Dews claims that the record does not demonstrate the existence of the elements of criminal contempt and that the district court erred by not using "the least possible power adequate to the end proposed" in sentencing him to ninety days' incarceration.

As the government points out, Dews never filed a notice of appeal with respect to the order of criminal contempt entered on September 20, 1995.[7] The present appeal is an appeal from the "Judgment of Conviction and Sentence entered in this action on the 26th day of January, 1996." A criminal contempt conviction is a district, independent proceeding that is independently appealable. *United States v. Hallahan*, 768 F.2d 754, 755 (6th Cir. 1985). Thus, Dews's appeal of his conviction for criminal contempt is not properly before this court.

Even if the issue was properly before the court, Dews's argument lacks merit. To support a criminal contempt conviction, four elements must be present: (1) There must be conduct which constitutes "misbehavior"; (2) the misbehavior must amount to obstruction of justice; (3) the conduct must occur in the court's presence; and (4) there must be some form of intent to obstruct. *Vaughn v. City of Flint*, 752 F.2d 1160, 1166 (6th Cir. 1985). Considering these four factors, the record of Dews's outburst and the district court's order supports Dews's conviction for summary criminal contempt.

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[7] The pro se notice of appeal filed by Dews on October 17, 1995 challenged jurisdiction, venue and alleged double jeopardy; the criminal contempt conviction was not raised.

IV.

Dews appeals his sentence, contesting the district court's calculation of his criminal history category and its enhancement for his role in the offense. This court reviews the district court's legal conclusions regarding the application of the Sentencing Guidelines de novo; however, the district court's findings of fact are accepted unless they are clearly erroneous. *United States v. Gort-Didonato*, 109 F.3d 318, 320 (6th Cir. 1997). A finding of fact is clearly erroneous when "although there is evidence to support it, the reviewing court is left with the definite and firm conviction that a mistake has been committed." *Id.* (citation omitted).

A. Criminal History Category

Dews argues that the district court's inclusion of his conviction for criminal contempt should not have been considered in determining his criminal history category.[8]

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[8] Apparently, there was some confusion with respect to this issue. In its order of contempt, the district court sentenced Dews to ninety days' incarceration, not to be counted "in any calculation of sentence imposed as a result of any conviction returned at the conclusion of trial." Because of this language, the probation officer initially did not consider the conviction in calculating Dews's criminal

Dews's argument centers around the definition of "prior sentence." Pursuant to the guidelines, a prior sentence means "any sentence previously imposed upon adjudication of guilt, whether by guilty plea, trial, or plea of nolo contendere for conduct not part of the instant offense." U.S.S.G. § 4A1.2(a)(1). Dews contends that because he was not adjudicated guilty of contempt, this conviction should not have been considered.

Dews's contention lacks merit. Federal Rule of Criminal Procedure 42(a) allows a summary disposition of criminal contempt when the behavior constituting the contempt occurred in the presence of the court. Dews was adjudicated guilty via Rule 42(a), and his conviction therefore is included in the determination of his criminal history category. *See United States v. Saperstein*, No. 94-5275, 1994 WL 706744 at *1 (6th Cir. Dec. 19, 1994) ("sentences for contempt of court are included in computing criminal history category if the sentence was a term of imprisonment of at least thirty days").

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history category in the Presentence Investigation Report. However, the judge later clarified that he intended that the contempt sentence should be served consecutive to any other sentence imposed, not that the contempt conviction should not be included in Dews's criminal history category. The contempt conviction ultimately was included.

Moreover, U.S.S.G. § 4A1.2(c)(1) specifically provides that sentences of at least thirty days' imprisonment for contempt of court are sentences that are included in the calculation of the criminal history category. Dews cites no precedent indicating that summary criminal contempt should be treated differently from a conviction of contempt following a hearing. Accordingly, upon de novo review, we find that Dews's sentence for criminal contempt was appropriately considered in the determination of his criminal history category.

B. Role in the Offense

Dews further argues that the district court erred by enhancing his sentence four levels for being an organizer or leader of criminal activity that involved five or more participants, pursuant to U.S.S.G. § 3B1.1(a). The district court determined that there were more than five participants in the criminal activity, considering that there had been as many as forty to forty-five individuals who had various jobs at the stores. The district court concluded that Dews was an organizer or leader because he had decisionmaking authority with respect to the inventory and pricing of the paraphernalia items. Dews takes issue with the district court's conclusion that five or more participants were involved, stating that the employees of the stores had no criminal culpability and therefore were not participants.

A "participant" is a person who is criminally responsible for the commission of the offense, but need not have been convicted. U.S.S.G. § 3B1.1, comment. n.1. Dews was convicted of the offense of selling, or the offering for sale, of drug paraphernalia. 21 U.S.C. § 863(a)(1). Although Dews may be right in asserting that not all of the employees had criminal culpability for this offense, we cannot find that the district court was clearly erroneous in finding that there were five or more participants who sold or offered for sale drug paraphernalia. The government elicited testimony at trial indicating that more than five employees sold items at the "tobacco counter," knowing that those items were drug paraphernalia. The government thus established that the four-level enhancement was warranted. Accordingly, the district court's determination is affirmed.

V.

Dews argues that he was the victim of prosecutorial vindictiveness because this matter was transferred from state court to federal court. The district court found that Dews's arguments referred to the state prosecutor and that Dews presented no evidence that would connect the actions of the state prosecutor to the federal prosecutor.

Dews's argument is wholly without merit. The test for prosecutorial vindictiveness is whether there existed a realistic likelihood of vindictiveness for the prosecutor's augmentation of the charges against the defendant. *United States v. Andrews*, 633 F.2d 449, 453 (6th Cir. 1980). There is simply no evidence whatsoever that the federal prosecutor had some ulterior motive in bringing the charges against Dews before a federal grand jury. Prosecutors have broad discretion to file charges when there is probable cause that someone has broken the law. *Id.*

VI.

For the foregoing reasons, we hereby **AFFIRM** Dews's conviction and sentence.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

Sixth Circuit Case Nº. 96-1268
Filed July 15, 1997

Pages B-1 thru B-1

Case No: 96-1268

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ORDER

UNITED STATES OF AMERICA

Plaintiff - Appellee

v.

EDWIN A. DEWS

Defendant - Appellant

FILED JULY 15, 1997 LEONARD GREEN, CLERK

BEFORE: GUY, MOORE and COLE, Circuit Judges.

Upon consideration of the petition for rehearing filed by the Appellant,

It is **ORDERED** that the petition for rehearing be, and it here by is, **DENIED**.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green, Clerk